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Military Clemency and Parole: Does It Work?

Colonel
James J. Smith
U.S. Army

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Faculty Research Advisor
Colonel Gary Leeling, USA

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ABSTRACT

A fight on May 11, 1992, among inmates at the United States Disciplinary Barracks raised serious questions about the clemency and parole system. This paper examines the fallout from the fight, and recommends changes to the Services' clemency and parole systems.

Leaders need this information because clemency and parole is an important part of the military discipline system. The paper includes information regarding the development of clemency and parole systems since the Civil War, and an evaluation of each Service's current system.

The military clemency and parole system is healthy, but it could be better. Accordingly, the paper provides recommendations to lessen the differences between the Services' systems and to improve the perception of fairness. Specifically, it recommends expansion of the Clemency and Parole Boards' membership, permissive appearances by convicted persons (or their representatives) before the Boards, adaption of the Federal Parole Commission standards for Board use, and greater publicity of Board proceedings.

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MILITARY CLEMENCY AND PAROLE: DOES IT WORK?

By

Colonel James J. Smith

There was a fight between two inmates at the United States Disciplinary Barracks (Fort Leavenworth) on May 11, 1992. This fight was not much different than many others--except it spread. Before long, 58 other inmates participated. The Under Secretary of the Army first called it a "minor disturbance." The inmates and their relatives told their Congressmen it was a "riot."

Because the inmates and their relatives described it as a riot, on May 18, 1992, the Acting Assistant Secretary of the Army (Manpower and Reserve Affairs) and a Deputy General Counsel toured the prison battle scene. They reported to the Under Secretary that there were problems at Fort Leavenworth.

This paper is about one of the problems they reported -- clemency and parole. Is the military clemency and parole system broken? Leaders need the answer, because clemency and parole is an important part of the military discipline system. If soldiers believe the discipline system is fair, it helps unit morale. If

they don't trust the system, it can hurt morale. We'll look at it this way:

- o Historical background. What has been the purpose of clemency and parole in the military?
- o Current systems. What does each Service do?
- o Analysis. What works? What doesn't?
- o Conclusion. Where do we go from here?

I will take you on a trip to the Disciplinary Barracks at Fort Leavenworth and to each of the Service's clemency and parole boards. When we finish, you will know how these systems work, how they affect military discipline, and whether they need fixing.

I expect to find that the military system is healthy. But it could be better. The goal is to make our trip worthwhile, by coming up with recommendations which serve commanders and increase discipline. These are lofty goals--let's get started.

HISTORICAL BACKGROUND

We learn lessons from the past. The more things change, the more they remain the same. Because clemency and parole is a human topic, rather than a scientific study, history is even more likely to lead us in the right direction. We look at how our predecessors used clemency and parole, so we can learn from their experiences and avoid mistakes.

An excellent source for the ancient history of clemency and parole in the military is the "Background of [the] Present System for the Administration of Clemency", a memorandum compiled in January 1954 from material in the Department of the Army Correction Branch and the Office of the Secretary of the Army. A good source for more recent developments is "Military Clemency: Extra-Judicial Clemency in the United States Army Prison System", a USA Command & General Staff College Special Study Project completed in May 1977 by T. R. Cuthbert (currently an Assistant Judge Advocate General of the Army). I used these two documents for much of the early information in the historical outline which follows.

Throughout this paper, "clemency" means an action taken after trial to reduce a sentence (other than an action taken by a court). "Parole" means an action taken to release a prisoner

from confinement before the entire term has been served (it does not reduce the sentence).

Clemency Before World War I

The President's power to grant clemency to a military prisoner comes from Article II, section 2, of the Constitution which states the President has the power to "grant Reprieves and Pardons for Offenses against the United States..."¹ In our early history, the President exercised this power through the Secretary of War. During this period, there was no military prison system, and commanders either held prisoners in local unit guardhouses or farmed them out to civilian jails or state prisons. This was true for long-term as well as short-term prisoners.²

The clemency system during this early period was not consistent, since prisoners were not under the same clemency authority (those in civilian prisons were usually subject to civilian clemency rules). This was also a period of bad conditions for prisoners, in general, whether civilian or military. Prisons were operated to punish offenders rather than to reform them.³

The prison system changed after the Civil War. There was a prison reform movement in this country (inherited from Europe)

which emphasized the social goal of rehabilitating prisoners rather than merely punishing them. As a result of this movement, and the complaints from commanders who had to run the local guardhouses (and their prisoners), the Secretary of War directed a board of officers to study the military prison system. The board travelled to Canada to visit the British military prisons. Upon return, they recommended the establishment of a central U.S. military prison.⁴

The United States Military Prison Act of 1873 established the location of the first central military prison as Rock Island, Illinois, but the authorities changed the location to Fort Leavenworth, Kansas, a year later. The establishment of this central military prison was the beginning of our military clemency program.⁵

The goal of the British military prison system was to restore a soldier to duty. This was consistent with the popular civilian reform goal of rehabilitating prisoners and returning them to society as productive citizens.⁶ One problem with our adoption of the British goal was that our existing clemency system was not set up to return soldiers to duty. Under our system, if a court-martial gave a soldier a dishonorable discharge, his commander ordered the discharge carried out when he approved the sentence. The only clemency option left, by the time a prisoner applied to the Secretary of War for clemency, was to reduce the confinement.

Thus, even though the Act of 1873 authorized restoration to duty, the Secretary of War did not use this option very often.⁷

The World War I Era

Congress fixed the restoration to duty problem in 1914. The manpower needs of World War I caused them to pass a law which authorized reviewing authorities to suspend the execution of prisoners' dishonorable discharges until they were released from confinement.⁸ In the right cases, clemency authorities could return soldiers to duty -- to fight in Europe, no doubt. The records of the United States Disciplinary Barracks, Fort Leavenworth, Kansas, show that authorities restored about twenty percent of the prisoners to duty during this period.⁹

After World War I, there was another significant development regarding clemency. In January, 1919, The Acting Judge Advocate General sent a memorandum to the Secretary of War which criticized the procedures used by courts-martial and reviewing authorities. The Secretary responded by suggesting that the Army should establish a system to review the severity of court-martial punishments. He was concerned that sentences that may have been appropriate when courts adjudged them -- during time of war -- were no longer appropriate after hostilities ceased. As a result, The Judge Advocate General set up a Special Clemency

board to review the cases of soldiers then confined in disciplinary barracks and penitentiaries. The board recommended clemency in 4724 of 5400 cases reviewed. The war was over, and it was time to let society reform these soldiers. The official explanation was, "these results did not imply that the sentences were generally considered to have been too severe when imposed[,] but merely that changed conditions made possible an amelioration of the rigors of punishment required in time of war."¹⁰

Clemency During World War II

If the prison reform movement in the nineteenth century was the mother of clemency, then the high water mark was World War II. Clemency was big business during this period. Once again, the need for manpower spurred the clemency decisions.¹¹

Brigadier General Cuthbert's 1977 Special Study lists the following statistics for prisoners who had a punitive discharge adjudged by a court during the World War II era:

- o Admissions to prison -- 84,245
- o Restored to duty -- 42,373
- o Paroled -- 1,793
- o Dishonorably discharged -- 22,542
- o Other dispositions -- 1,761

o Still confined December 1946 -- 15,774

These are amazing statistics. Authorities returned over half of the prisoners with a punitive discharge to duty. Another way of viewing it is that they restored three full infantry divisions to the fighting force.

A 1944 study by Mr. Austin H. MacCormick, a consultant to the Under Secretary of War, pointed out that during wartime the military prison system was expected to exercise a strong deterrent effect on potential offenders, and, at the same time, salvage and conserve manpower. He also emphasized the need to treat soldiers humanely, while ensuring that the system does not pamper soldiers who have failed in their duty by allowing them to sit in a safe cell instead of a foxhole. One way to conserve manpower, and ensure that we don't pamper prisoners, is to put them back in the foxhole. During wartime this also had a deterrent effect. It deterred soldiers who might have committed crimes for the purpose of avoiding hazardous duty.¹²

Clemency After World War II

Things changed after World War II. Clemency remained an important consideration, but restoration to duty was not popular.

In May, 1945, the Secretary of War established the Advisory Board on Clemency. The purpose of the Board was to establish policy and to review individual cases and make recommendations to the Secretary. The Board consisted of a representative from the Under Secretary of War's office, a prominent judge, a regular Army officer, and an overseas veteran. In November, 1945, the Secretary of War appointed former United States Supreme Court Justice Owen J. Roberts chairman of the Advisory Board.¹³

In a report to the Under Secretary of War, Justice Roberts expressed the opinion that the clemency function was vital to the military justice system. He stated that before anyone formed an opinion as to the fairness of the Army court-martial system, they should take into account the sentence finally fixed by the Under Secretary after the recommendations of the clemency boards. He referred to clemency as the "capstone of the whole system of military justice."¹⁴

Justice Roberts' Advisory Board operated for about two years, and considered the cases of 28,717 military offenders. They frequently recommended clemency in the interest of reducing sentences that seemed too heavy in light of post war policies, but restoration to duty was eclipsed by parole. It made more sense to return prisoners to society in the post war years (this tendency continued during the Korean War when the Under Secretary only restored 11% of those with punitive discharges to duty). In

support of the parole effort, the Secretary established a new Advisory Board in the Under Secretary's Office in 1946 to direct and supervise parole.¹⁵

The Joint Clemency and Parole Board

On August 18, 1947, the Secretary of Defense combined Justice Roberts' 1945 Clemency Advisory Board and the Under Secretary's 1946 Parole Advisory Board, and replaced them with a joint Army and Air Force Clemency and Parole Board (the Congress established the Air Force as a separate service that same year). The joint Board's mission was to develop and recommend uniform policies with respect to both clemency and parole matters, and to recommend action to be taken by the Secretary concerned in individual cases.¹⁶

This new joint Board was unique because it was recommending action by separate Service Secretaries (rather than the Secretary of War only), and, at the same time, developing uniform policies for both Services.¹⁷

The general objective of the 1947 joint program was to maintain uniform policies with regard to punishment and treatment of prisoner personnel of the respective departments; obtain uniformity of sentences for similar offenses and offenders;

reduce sentences to the minimum consistent with maintaining current and future discipline in the servi[c]es and the best interest of society and the prisoner; release from confinement under parole supervision selected prisoners who have served a portion of their sentences and whose release would be in the best interest of society, the services and the prisoner; and maintain uniform policies with regards to parole of prisoner personnel of the respective services. The emphasis for the 1947 joint Board was on uniformity.¹⁸

This marriage of the Army and Air Force clemency and parole programs was short. The Secretary of Defense issued an order on March 26, 1949, which formally transferred restoration, clemency, and parole powers over Air Force prisoners to the Secretary of the Air Force.¹⁹ This 1949 transfer order was apparently the basis for separate Army and Air Force clemency/parole statutes when Congress recodified military law in Title 10 of the United States Code in 1956.²⁰

Today's Clemency Law

On January 10, 1967, the Army (acting as the Department of Defense representative) forwarded a draft bill to the Congress which became today's clemency/parole statute. The Acting Secretary of the Army's forwarding letter stated in the paragraph

titled "PURPOSE OF THE LEGISLATION" that "[a]s in the case of military justice, a high degree of uniformity among the services is desirable in the administration of military correctional facilities and the treatment of persons convicted under the Uniform Code of Military Justice."²¹ The Acting Secretary of the Army pointed out that he thought having one statute which applied to all the services rather than a statute for each service would help uniformity.

The troublesome thing about this clemency statute (enacted July 5, 1968, as the Military Correctional Facilities Act of 1968, Public Law 90-377, codified at Title 10, United States Code, Sections 951-956) is that it didn't set up a joint board. Furthermore, it didn't take clemency authority away from the Service Secretaries. If uniformity was the goal, then why have a law which tells each Secretary to establish his own separate clemency system?²²

Problems With the Law

Seven years after Congress enacted the 1968 clemency law, the Comptroller General raised the uniformity problem in a 1975 Comptroller General report entitled, "Uniform Treatment of Prisoners Under the Military Correctional Facilities Act Not Being Achieved (FPCD-75-125)." The report stated that the

Services were not treating prisoners with the uniformity intended by the 1968 law.²³

The Department of Defense responded to the report by forming the Department of Defense Corrections Council. A senior official from the Office of the Assistant Secretary of Defense (Force Management and Personnel) chaired the Council, and the members included representatives from each of the Services. The purpose of the Council was to discuss corrections policy and exchange ideas. Specifically, the members were to keep the Department of Defense Directive and the Service regulations up to date and consistent with each other. The Corrections Council was meant to be a step toward uniformity.²⁴

Congress Complains About the Lack of Uniformity

Congress got involved ten years later. The Senate Report on the 1985 Department of Defense Authorization Act directed the Secretary of Defense to study the post trial confinement procedures.

The Senate Armed Services Committee suspected that clemency procedures were not as uniform as Congress intended when they passed the 1968 law. They said, "there may be insufficient connection between the processes under the Uniform Code of

Military Justice (10 U.S.C. et seq.) by which a military member may be sentenced to confinement and the subsequent processes under which that member may be required to serve that sentence. It is clear that even the most fair and most just pretrial, trial, and post trial appellate procedures could be undermined if the subsequent confinement procedures are not designed or administered in a fair and just manner."²⁵

Specifically, they told the Secretary of Defense to look at the clemency procedures in each of the Services and explain the differences. They were worried that the Services weren't giving prisoners adequate due process when they considered their clemency requests.

Fortunately, the same T. R. Cuthbert who had studied the clemency system in the 1977 Special Study (cited above) was now working in the Office of the Secretary of Defense as the Chairman of the Corrections Counsel (as an Army Colonel). Colonel Cuthbert took a fresh look at each Services' clemency system.

Colonel Cuthbert outlined the procedures each Service used, and compared them. He found that although each Service used different procedures, they adequately protected each prisoner's rights. However, he recommended that the Services "adopt a uniform practice of reviewing parole and clemency actions that is streamlined, fair, and equitable." He noted that the 1968 law

did not require the Services to use common procedures, but to do so would be "sound policy." He thought it made sense to give prisoners the same uniform treatment after trial that military law gave them during trial. His recommendations mirrored the legislative history of the statute (explained above).²⁶

On August 7, 1985, The Secretary of Defense (Weinberger) sent Colonel Cuthbert's report to the Chairmen of the House and Senate Armed Services Committees (Representative Aspin and Senator Goldwater). Secretary Weinberger stated that the existing procedures were "fair and consistent with the requirements of due process." However, he promised to "take steps to streamline and make more uniform our present clemency and parole procedures."²⁷

Congress Complains Again

Before the Services could act, Congress complained again. The 1986 Senate Report accompanying the 1987 Defense Authorization Act referred to the earlier report and noted that the Services still hadn't fixed the problem. They said the Senate Armed Services Committee continued to get "numerous complaints" from prisoners about "the lack of clear, objective, and uniform standards being utilized in parole and restoration decisions." They reminded the Services that one of the principle objectives of the Uniform Code of Military Justice was uniformity, and they

expressed concern that they still didn't see much uniformity in the end stage of the process.²⁸

This second Congressional warning got an immediate reaction. One month after Congress published the report, a team headed by the Army Assistant Judge Advocate General for Civil Law, then Brigadier General John Fugh (currently The Judge Advocate General of the Army), visited Fort Leavenworth.

Brigadier General Fugh's team discovered that uniformity in prisoner administration was indeed a major issue. As a result, one of the questions they listed as needing further study was whether clemency/parole requirements and procedures should be made uniform among the Services, or, alternatively, whether there should be a joint Service clemency/parole board.²⁹

1988 Department of Defense Directive

The goal was uniformity -- and Congress was watching. The Department of Defense needed to take action. The Department had published their last Directive on clemency in 1968. So, the Office of Force Management and Personnel set to work and published a new version on May 19, 1988, titled, "Confinement of Military Prisoners and Administration of Military Correctional Programs and Facilities."

The objective of the new Directive was "to promote uniformity within and among the Military Services in the treatment of prisoners, the operation and administration of correctional facilities and programs, and the consideration of prisoners for return to duty, clemency, or parole."³⁰

More importantly, the Directive officially established the Department of Defense Corrections Council which the Department had formed earlier. The Directive clearly set out the Council's duties to exchange information, and to make sure that the Directive, and the implementing Service regulations, "promote uniformity in the corrections program consistent with the needs of the Military Services."³¹

Some of the specific things the Directive told the Services to do included issuing new regulations which were consistent with the Directive, providing return-to-duty programs for selected prisoners, and providing clemency and parole programs in accordance with the Directive and the applicable law (10 U.S.C., Chapters 47 and 48; and the Manual for Courts-Martial, United States, 1984). The Directive had a very detailed section on the rules governing clemency, parole, and restoration to duty.³²

The Directive looked like the drafters intended more inter-service uniformity, but it still gave the Services a lot of flexibility. For example, it left it up to the Services to

determine their "needs," and told the Council to "attempt to resolve inter-Service differences and achieve uniformity through voluntary adjustments in policy or practice by the Service(s) concerned."³³

One inter-Service difference was the way they handled the implementing regulations. The Directive tells the Services to issue regulations which are consistent with the Directive, and to forward their implementing documents "within 30 days of the effective date." So far, only the Army and Air Force have published implementing regulations. The Army published a new regulation August 9, 1989. The Air Force followed suit on September 29, 1989. The Navy published their last regulation on November 25, 1985 (three years before the Directive).³⁴

The Disturbance/Riot at Fort Leavenworth

Four years after the Department published the new Directive, the lack of uniformity became an issue, again. This time it wasn't the Congress or the Comptroller General complaining -- it was the inmates.

The inmates complained that the clemency and parole system was harsh and unfair. The Army prisoners felt the Air Force prisoners received more favorable consideration than they got,

the Marine prisoners thought everyone received a better shot at clemency and parole than they got, and many prisoners complained that the standards were different from service to service and that the standards the clemency and parole boards used weren't clear and objective.³⁵

The disturbance/riot started as a fight between two inmates in the shower at 9 P.M. on May 11, 1992. Next, 58 other inmates refused to return to their cells, and became involved. The prison cadre called in reinforcements, and the guards locked the inmates in their cells for the night, but the problem wasn't over.

The next day, a different group of prisoners refused to return to their cells after their afternoon recreation period. The guards locked these prisoners in their domicile wings until they could get help to put them in their cells. Before the guards could get them locked in their cells, they caused over \$50,000 damage to property in the domicile wings -- their own living areas.³⁶

Six days later, the Acting Assistant Secretary of the Army (Manpower and Reserve Affairs) led a team of high-powered Department of the Army officials to survey the damage. The team interviewed prison officials and inmates as well. They concluded that while there was no clear cause of the incident, there were systemic problems.

One problem which emerged was the clemency and parole system. The team was concerned that the clemency and parole system may not have kept pace with the changing profile of the prisoner population. The inmates, on the other hand, felt there were differences in the Services' clemency and parole programs which led to a lack of uniform treatment from Service to Service for prisoners.

The Solution to the Problem

On June 22, 1992, The Under Secretary of the Army directed the Acting Assistant Secretary of the Army (Manpower and Reserve Affairs) to gather clemency and parole statistics for all the Services. The Under Secretary also told the General Counsel of the Army to conduct an independent assessment of the data and make recommendations.³⁷

The same day, the General Counsel asked The Judge Advocate General of the Army to assign the review of the data to a senior Judge Advocate. On June 26, 1992, The Judge Advocate General told me to do the review. After we tour each system, I will tell you what I found and recommended.

CURRENT SYSTEMS

We will look at the Army system in detail. Then we will compare the Air Force and Navy programs with the Army system (and glance at the Federal civilian system administered by the United States Parole Commission).

The Army System

Under the current law, each Service Secretary has the authority to grant clemency and parole to prisoners who were subject to the Secretary's authority when they committed the offenses for which they were convicted by a court-martial. This is true regardless of where the prisoner may be confined.

The Secretary's authority includes the power to remit or suspend any part of a court-martial sentence which hasn't been executed (carried out). It also includes the power to restore soldiers to active duty and reenlist them (if discharged). Lastly, it includes the power to parole inmates from prison to civilian life.³⁸

The process begins with the officer who convened (ordered) the court-martial. He is the first person who looks at whether the sentence is appropriate. The convening authority has broad

clemency power and can modify any part of a sentence, other than a death sentence, as long as he doesn't increase it.³⁹

The next step is at the confinement facility. Before the Army Clemency and Parole Board will consider the case, the prisoner must meet the eligibility criteria, and the confinement facility disposition board and commander must review the case. For prisoners in a Federal prison, the appropriate Federal official must review the case.⁴⁰

The Army follows the eligibility rules set out in the 1988 Department of Defense Directive. The rules have exceptions, but in general these are the clemency eligibility rules:

- o approved sentence to confinement less than 12 months -- not eligible for clemency
- o 12 months to less than 10 years -- considered at 9 months; annually thereafter
- o 10 years to less than 20 years -- considered at 24 months; annually thereafter
- o 20 years to less than 30 years -- considered at 3 years; annually thereafter
- o 30 years to life -- considered at 5 years; annually thereafter
- o Death -- not eligible for clemency

These are the parole eligibility rules (triggered by a prisoner request for parole):

- o Must have an approved punitive discharge/dismissal or have been administratively discharged or retired
- o 12 months to less than 30 years -- considered at one-third served (after six months); annually thereafter
- o 30 years to life -- considered at 10 years; annually thereafter
- o Death -- not eligible for parole⁴¹

Two months prior to a prisoner's eligibility for clemency or parole, the confinement facility disposition board will review the case. At Fort Leavenworth (USDB), the board consists of two officers and one noncommissioned officer or civilian. The inmate may attend the hearing, but only USDB cadre may appear on his behalf. The board makes recommendations to the Commandant, who will then make recommendations to the Army Clemency and Parole Board.

The Army Clemency and Parole Board, located in Washington, D.C., reviews cases for the Secretary of the Army. In most parole cases, the Board has the authority to act for the Secretary. In clemency cases, the Board makes a recommendation to the Deputy Assistant Secretary of the Army (Review Boards and Equal

Employment Opportunity Compliance and Complaints Review) who acts for the Secretary.⁴²

The Board has three members, but only the Chairman is a permanent member. The other members rotate, and usually sit on the Board only once or twice a year. The Chairman runs the Board on a day-to-day basis and works directly for the Deputy Assistant Secretary.

The Army Board meets twice a week for half day sessions, and they consider about 20 cases per session. An examiner briefs each case and makes recommendations. The Board then discusses the case and makes a decision. They spend about ten minutes on each case. The regulations do not allow the prisoner or his representative to attend the hearing, or even for family members or other interested persons to attend.

It was my impression (based on my observation of a Board session) that the examiners and the Board members tend to support the recommendations of the Commander of the confinement facility. The examiners and the Chairman are very experienced. The rotating Board members are very conscientious, but not experienced. As a result, the Chairman appears to be able to steer a close case the direction he wants.

The Army clemency approval rate is very low. The last four years the Deputy Assistant Secretary approved clemency in less than two percent of the cases the Board considered. The parole approval rate was much higher. The Board approved parole in almost 30 percent of the cases they considered. The Director of Inmate Administration at the USDB told me that the clemency approval rate has been very low for at least the last 20 years. He also said that although the Board does not parole most prisoners on the first consideration, 90 percent are paroled by the third consideration.

The Board uses the factors listed in Army Regulation 15-130 to help decide cases. The factors are nearly the same as the criteria listed in the 1988 Department of Defense Directive, and include the nature and circumstances of the offense, the individual's civilian and military history, the individual's confinement record, the individual's personal characteristics (especially remorse), the victim's concerns, and the parole plan (if applicable). Restoration/reenlistment cases are very rare, but in those cases the Board would also consider the individual's motivation for future service, and the impact that restoration or reenlistment would have on the Army.

The Army regulation makes it clear that the Board has broad discretion to decide the relevance and weight to be given any factor. There is no magic combination that requires clemency or

parole, and satisfying the listed factors does not give any individual the right to clemency or parole.

The Chairman notifies the individual in writing of the decision. In parole cases, if the Board (or the Deputy Assistant Secretary) denies parole, the notice will state the reasons for the denial, and the prisoner has 30 calendar days from receipt to submit a written appeal. The Deputy Assistant Secretary or Assistant Secretary of the Army (Manpower and Reserve Affairs) will decide the appeal and notify the prisoner in writing of his decision with the reasons for any denial. The last four years the parole appeal authority has granted 20 percent of the appeals.

The Air Force System

At first glance, the Air Force system looks a lot like the Army system. Air Force regulation 125-18 sets up the same eligibility criteria for clemency and parole as the Army regulation, and even establishes an Air Force Clemency and Parole Board which could be very similar to the Army Board -- at least three members, no personal appearances, the same factors considered. However, in practice, there are important differences.

The Air Force Board has five permanent members (plus alternates). They sit once a week for half a day, and some members have been

detailed to the Board for several years. Although the Director, Secretary of the Air Force Personnel Council, is the nominal Chairman, each Board member is very knowledgeable about the individual cases and the clemency and parole system. When I observed the Air Force Board, the Chairman did not appear to be as influential as the Army Board Chairman.

The Air Force Board results are also different. The last four years their clemency approval rate has been four times higher than the Army's rate. Their parole approval has been about 10 percent higher, while their parole revocation rate has been lower than the Army's.

My impression was that the Air Force Board was extremely professional and efficient. Their larger numbers, coupled with their extensive experience, produced well-reasoned decisions.

The Navy System

The Navy system is different than both the Army and Air Force systems. As I stated above, the Navy has not yet published a regulation to implement the 1988 Department of Defense Directive. Accordingly, their Clemency and Parole Board operates with a mixture of their 1985 regulation, the 1988 Directive, and a collection of less formal rules.

In an interview, July 17, 1992, the Executive Secretary of the Navy Board told me they have a permanent Board composed of five members which includes a legal officer and a health care professional. I observed the Navy Board proceedings, and they appeared very efficient (they considered about 40 cases during a half day session).

The most significant differences between the Navy and the other two Services are that the Navy allows personal appearances on behalf of inmates, and they have adapted the United States Parole Commission's weighted objective criteria to aid them in deciding parole cases. In addition, they use these criteria when advising inmates of the reasons for parole denials.⁴³

The Navy's statistics are similar to the Army's, but the Navy has almost no parole revocations. This may be because they use the Parole Commission's objective standards; however, it is more likely caused by their extensive use of incremental/conditional parole. Under this parole program, if an inmate fails to meet the parole conditions, they bring him back without a parole revocation hearing (and no revocation statistic). The Army does not use this program.

ANALYSIS

When the inmates rioted, they were saying that it was their opinion that the military clemency and parole system was broken. Their general perception was that the whole system was harsh and unfair.

Specifically, they thought there was disparate treatment among the Services; they didn't think there were clear standards which governed decisions; they thought the Clemency and Parole Board decisions were made in a sterile environment, without adequate prisoner participation; they viewed clemency and parole as "rights" they had been denied; and, they didn't think the Army Clemency and Parole Board gave them specific enough reasons why they denied their cases. Some of these perceptions had no basis in fact; others were accurate, and we need to fix them.

Disparate Treatment and Decisions Made Without Prisoner Participation. The statistics show that the approval rates vary from Service to Service. This is probably due to the differing philosophies the Services have regarding the purpose of punishment, but it may also be due to the differing Board procedures described above. A five member permanent Board with subject matter experts for each Service will increase efficiency and the appearance of professionalism. Allowing persons to appear on behalf of a prisoner will enhance the perception of

fairness. A single joint Service board is not a good solution, as long as the law tasks each Service Secretary with administering his own program.

Lack of Clear Standards and Inadequate Reasons for Denial. The standards used by the Army and Air Force Boards do not establish any objective weight for each factor. As a result, when the Board denies parole, they can only outline in general terms the reason(s) for the denial. The Navy system looks more precise. The United States Parole Commission standards the Navy uses are only a guide, but they are a weighted, mathematical guide which looks fair. The Navy uses these same standards to explain denials to inmates, and the inmates appreciate the specificity.

Perception of Unfair Treatment and Denial of "Rights." The facts do not support these perceptions. The facility commanders can renew their efforts to educate inmates regarding the fairness of the system. However, it is not likely that these attitudes will change. When the authorities deny clemency or parole requests, prisoners will continue to be unhappy (and vocal).

CONCLUSION

The military clemency and parole system is fair and professional. However, I recommend some minor changes to improve the public

perception of the system. These changes would also help the Services achieve the "uniformity" which the Congress intended when they passed the 1968 clemency and parole statute.

- o Require each Service Board to have five permanent members including one legal officer and one health care officer.
- o Allow persons not confined to appear before the Board, and allow those confined to have a representative appear on their behalf.
- o Adapt the United States Parole Commission standards for Board guidance, and use the standards to notify prisoners of parole denials.
- o Televisе Board proceedings to confinement facilities for viewing by cadre, and encourage them to educate inmates.

Our military clemency and parole system is healthy, but we need to do a better job of public relations. We need to advertise how fair and professional the system is, and make sure that the appearance of uniformity is clear. Our good soldiers are watching -- we owe them the right message.

1. U.S. Constitution, Article II, Section 2.
2. "Background of [the] Present System for the Administration of Clemency." Office of the Secretary of the Army Memorandum, May 28, 1954: at 1 (filed JAGA 54/5169, Office of The Judge Advocate General, Headquarters Department of the Army, Washington, D.C.).
3. Ibid at 1.
4. "Military Clemency: Extra-judicial Clemency in the United States Army Prison System." Special Study Project, USACGSC, Fort Leavenworth, Kansas, May 20, 1977, LTC T. R. Cuthbert, at 3.
5. "Background of [the] Present System for the Administration of Clemency" at 1.
6. "Military Clemency: Extra-judicial Clemency in the United States Army Prison System" at 3,4.
7. "Background of [the] Present System for the Administration of Clemency" at 2.
8. Ibid at 3.
9. "Military Clemency: Extra-judicial Clemency in the United States Prison System" at 4.
10. "Background of [the] Present System for the Administration of Clemency" at 5.
11. "Military Clemency: Extra-judicial Clemency in the United States Army Prison System" at 6.
12. "Background of [the] Present System for the Administration of Clemency" at 8,9.
13. Ibid at 10,11.
14. Ibid at 11.
15. Ibid at 12.
16. Ibid at 13, 14.
17. Ibid at 13.
18. Ibid at 13,14.
19. Ibid at 13.

20. 84th Congress, 1st Session, House of Representatives, Report No. 970, 1-18.
21. 2 U.S Congressional & Administrative News 1968 at 2479.
22. 10 U.S.C. section 951-956.
23. "Uniform Treatment Under the Military Correctional Facilities Act Currently Not Being Achieved." Comptroller General Report (FPCD-75-125).
24. "DOD Corrections Council -- Information Memorandum." March 11, 1986. Office of The Army Judge Advocate General (filed DAJA-CL 1986/6277).
25. 235 Congressional Record S34685 (daily ed. May 31, 1984).
11. "Military Confinement Procedures -- Action Memorandum." Undated. Colonel T.R. Cuthbert. Office of the Assistant Secretary of Defense (Force Management and Personnel).
27. Ibid.
28. S. 331 (to accompany S. 2638), 99th Cong., 2d Sess. (1986).
29. "Trip Report -- United States Disciplinary Barracks and United States Army Correctional Activity." August 28, 1986. Brigadier General John L. Fugh. Office of The Army Judge Advocate General.
30. Department of Defense Directive 1325.4, Confinement of Military Prisoners and Administration of Military Correctional Programs and Facilities, para. C 1. (May 19, 1988).
31. Ibid at para. F.
32. Ibid at Encl 1, para. J.
33. Ibid at para. F.
34. Ibid at paras. D, H.
35. Interview with Mr. Donley W. Brothers, Assistant Chief of Staff for Administration, USDB, at USDB on July 14, 1992.
36. "Damaged Property and Equipment (AF and NAF)." Memorandum for Commandant USDB. May 17, 1992. Terry L. Norman. Assistant Chief of Staff, Resources and Logistics, USDB.
37. "Review of Inmates' Grievances." Memorandum for the General Counsel and the Acting Assistant Secretary of the Army (M&RA).

June 22, 1992. John W. Shannon. Office of the Under Secretary of the Army.

38. 10 U.S.C. Section 951-954.

39. Manual for Courts-Martial, United States, 1984, Rules for Courts-Martial 1105, 1106, and 1107.

40. Army Regulation 15-130, Army Clemency and Parole Board, para. 3-1 (9 August 1989).

41. Ibid.

42. Ibid at paragraph 1-4.

43. Code of Federal Regulations, Volume 28, Chapter 1, Section 2 (July 1, 1992).